ORDER OF THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA IN Case No. M-172-73, entered November 15, 1973

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD ON October 25, 1973, before the undersigned United States District Judge on

MOTION OF ATELIERS ROANNAIS de CONSTRUCTIONS TEXTILES AND ARCT, INCORPORATED, TO QUASH AND SET ASIDE SERVICE OF PROCESS; FOR ENTRY OF A PROTECTIVE ORDER; AND FOR ATTORNEYS' FEES AND EXPENSES

and the Court having examined the briefs filed by counsel for each of the parties in support of and in opposition to said motion, together with the documents filed in support of said briefs, and having heard extensive oral argument from counsel for both Celanese Corporation and Fiber Industries, Inc. (hereinafter designated plaintiffs) and ARCT, Inc., and Ateliers Roannais de Constructions Textiles (hereinafter designated defendants);

AND IT APPEARING that circumstances exist[1] which, in the opinion of the Court, obviate the immediate necessity for a determination of the question of whether or not this Court has authority or jurisdiction to order the deposition of either of the corporate defendants "through Henri Crouzet, its President," and, accordingly, this issue is expressly left open for decision by the Court at some later date should said issue again become a matter of controversy between the plaintiffs and defendants;

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[1] See MEMORANDUM dictated by the Court at the conclusion of oral argument on defendants' motion, and certified by the Official Reporter of the United States District Court for the Middle District of North Carolina on November 5, 1973.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the two subpoenas, dated August 10, 1973, issued by the Clerk of the United States District Court for the Middle District of North Carolina, and directed to ARCT, Inc., and Ateliers Roannais de Constructions Textiles be and the same are hereby quashed without prejudice to the right of the plaintiffs to apply to this Court for the entry of an order allowing the issuance of similar subpoenas, upon:

(a) a showing by plaintiffs that the use of letters rogatory (28 USC 1781, Rule 28(b), Fed. Rules of Civil Procedure) will not produce the information sought to be obtained by plaintiffs by means of oral deposition of Henri Crouzet, and

(b) a showing that good faith efforts have been made to allow the use as evidence in MDL Docket No. 82,[2] depositions of Henri Crouzet, and exhibits related thereto, heretofore taken in C/A 71-306,[3] and that notwithstanding such efforts, said depositions and exhibits cannot, by stipulation or otherwise, be used as evidence in said Florida litigation, and

(c) a showing that even though the previous depositions of Henri Crouzet, and exhibits related thereto, may, by stipulation or otherwise, be used as evidence in MDL Docket No. 82, that such use will not produce the information sought by plaintiffs from Henri Crouzet for use in MDL Docket No. 82.

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[2] Designation for a large number of cases involving similar issues consolidated for discovery in the United States District Court for the Southern District of Florida.

[3] Designation for a large number of cases involving similar issues consolidated for discovery and trial in the United States District Court for the District of South Carolina.

(d) a showing that no other reasonable method will suffice to gain the evidence which plaintiffs contend can only be made available to them through the deposition of ARCT, Inc., and/or Ateliers Roannai de Constructions Textiles, through Henri Crouzet, President of each of said defendants;

2. That the foregoing portion of this order is without prejudice to the right of the defendants to contend and to show to this Court that it is without authority or jurisdiction to enter an order allowing a re-issuance of the subpoenas quashed by this order, even though all of the conditions referred to in Paragraph 1(a)(b)(c)(d) above are fully met by plaintiffs, it being expressly understood that the Court has deliberately left this question open for decision, and that nothing herein contained shall be construed as an inference or intimation by the Court that such subpoenas should or should not be allowed.

3. That this order is made by the Court pursuant to the discretionary power relating to discovery procedures vested in the Court by the provisions of Rule 26(c), Fed. Rules of Civil Procedure.

/s/ Eugene A. Gordon
Chief Judge

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS BEFORE THE RESPONDENT JUDGE ON February 14, 1973, in Civil Action 71-306 In the District Court for the District of South Carolina

MR. MANN [Duplan counsel]: Your Honor, the last item I have that I would like to discuss with the court relates to the production of the various documents to Celanese, and the procedure that should be or that we can follow with the blessings of the court. I have had a call or two from various attorneys from whom a request has been made. I understand the bond which your Honor has established has been filed, and they are now making a request for copies of these documents, and I very honestly do not know the method that your Honor has in mind by which this is to be accomplished. I understand that one of the attorneys representing Celanese may be in the court room, and I would for their benefit like to know the procedure. Is it your Honor's intention that the individual attorneys are going to establish the charge for these documents, or should we come back to the court and ask your guidance with respect to the charge, or just what procedure should we follow in that respect.

THE COURT [Respondent Hemphill]: Well the information has been developed at great expense to both of you, and if the gentleman said, and I quoted him in my order, "This type of information frequently can be obtained through professional courtesy and cooperation at such time as the case is complete." They submitted to the jurisdiction because, really, I had no jurisdiction over them. They never have been in the case, and I don't think until it is submitted to the jurisdiction I am not sure they are before the court. Of course, nowadays, you don't go by the old rules so I thought the best thing would be for them to submit to the jurisdiction which

they did. They may deny it later, but I think at such time as it is appropriate in cleaning up this case I will ask counsel for their various statements as to the cost which they think should be assessed against these people since they didn't participate, and they didn't produce, and didn't have anything to do with it. Not only that, but the court has had terrific expense some of which, I think, should be charged as a cost of the case. Now, if he asks you to produce then that is up to you because it sets forth through courtesy and cooperation of counsel. At the same time, I would like to know at the end of the case what has been produced.

The court stenographer asked me a minute ago if they can get a copy of this record, and I said, "I suppose so if they put up the money." They order a copy of the record, and they haven't done anything to produce the record, and other people have. I don't know how much expense you have gone to in the case. I just don't have any idea. It seems to me when you try to get a free ride where other people have gone to a lot of expense, you ought to pay your share.

MR. MANN: Your Honor, might I then inquire if this procedure would be satisfactory with your Honor: We can go forward with the production of such documents, etc. of which request has been made to us, and subsequently after the production has taken place it is my understanding that the bond is there for the purpose of your Honor assessing the costs that would be involved and that payment will cover the cost of the various documents.

THE COURT: That is my understanding. Is there any objection on your part?

MR. GREENFIELD [DMRC counsel]: No, your Honor.

THE COURT: Because bond is in the penal sum of $50,000 conditioned upon the payment of such sums as the court may determine is appropriate in view of the fact petitioner bore no expense and made no arrangements, and suffered none of the difficulties. I think that is fairly broad.

MR. MANN: Well, we were in the position of having the request, and we did not want to do something that was not going to be in the spirit and intent of the court.

THE COURT: I still have some doubt as to the propriety of it, of their coming in, but at the same time the Fourth Circuit indicated to me something should be done, and once they made their move I thought it was up to me to try to follow it, and I hope I did follow what they said.

MR. MANN: Thank you, your Honor.

COLLECTION OF CORRESPONDENCE

LETTER FROM EDWARD S. IRONS TO CHARLES B. PARK, III, October 30, 1973

Dear Mr. Park:

This will confirm our telephone discussion of today's date concerning the procedures described in your letter of October 19, 1973 addressed to me.

In your October 19, 1973 letter you referred to my ". . . efforts to obtain access to certain documents etc. compiled and prepared in Consolidated Civil Action 71-306, . . .". You also referred to our prior negotiations in which your position was that copies would be made available to me only on a "non-selective basis".

The final paragraph of your letter of October 19, 1973 states:

> "Since February of this year our preparation for trial in the South Carolina action has progressed to the point where it would no longer be significantly disruptive to us to permit you to inspect the documents etc. in question, and obtain copies thereof on a selective basis. *Accordingly, we have offered to make available to you at our offices in Charlotte our master numerical set of the documents in question.* In response to our offer you have advised that Mr. Spellman of your firm will come to our offices on Monday, October 22 to commence a review of these materials." (Emphasis supplied.)

In our telephone conversation of today's date you advised, however, that you would *not* make available to me documents in your possession produced subsequent to about January 1, 1973, by DMRC, DMI and Chavanoz to the "Throwsters" (including your clients) in the South

Carolina action. You stated that the reason that such documents would not be made available is that Mr. Greenfield, counsel for DMRC, DMI and Chavanoz, has invoked the general and oral protective order of Judge Hemphill to insist that the documents in question be made available only at Mr. Greenfield's New York offices and not through your offices in Charlotte. It is understood from our discussion that only as to certain selected documents Mr. Greenfield also relies upon a special and presumably written protective order. We had previously undertaken, in a telephone conversation with Mr. Greenfield's associate, Mr. Finnell, not to press at this time for these selected documents.

I stated in our telephone conversation of today that it was unacceptable to Celanese and FII to obtain documents from Mr. Greenfield.

There were several reasons why we elected to proceed with the document inspection in your offices in the manner indicated in the above-quoted final paragraph of your October 19, 1973 letter. Among these is the fact that the documents in question *are* in the posession and control of your clients who are also parties to MDL 82 pending in Florida and therefore subject to the process of the Florida court. This being the case, the question of the *right* of Celanese and FII to have these documents produced, without the imposition of penal sanctions by Judge Hemphill and as required by Rule 34 was properly before Judge Atkins in Florida. It was felt for this reason that we had some protection against the aforesaid penal sanctions in furtherance of which Judge Hemphill has required Celanese and FII to post $50,000 penal bond. For this reason we decline to accept documents produced *only* by Mr. Greenfield, who is not and whose clients are not before the Florida court. To do so would expose us totally to the prior restraint of the penal sanctions threatened by Judge Hemphill's outstanding orders.

As I explained, it will, accordingly, be necessary for Celanese and FII in due course to press the previously filed Rule 37 motion in MDL 82 to obtain from your clients the documents which Mr. Greenfield refuses to release.

In our view, contrary to par. 11 of Judge Atkins' order of October 29, 1973, this Rule 37 motion is not *moot* for at least two reasons. First, the question of our *right* under Rule 34 to obtain the documents for use in the Florida litigation *absent* the imposition of penal sanctions by a foreign court requires resolution. Secondly, *it* now appears that we cannot obtain some of the documents sought by our Rule 37 motion, *i.e.*, those subject only to Judge Hemphill's oral and general protective order which Mr. Greenfield has refused to permit you to release to us.

Very truly yours,

/s/ Edward S. Irons

LETTER FROM JAY GREENFIELD TO EDWARD S. IRONS

November 2, 1973

Dear Mr. Irons:

I have a copy of your letter to Charles Park, dated October 30, 1973, which relates to documents that my clients produced in the captioned action.

I do not want to get into any dispute between you and Mr. Park; nor do I want to get into any dispute with you. So far as my clients are concerned, you may inspect documents which they produced in the captioned actions in 1973 so long as they do not contain trade secret information. If you wish to inspect documents that do contain trade secret information, we should discuss that with you or your office so that the interests of our respective clients can be protected.

Given the highly confidential nature of some of the documents produced by our clients in 1973, and given the fact that Mr. Park represents throwsters against whom my clients are litigating, it would not be appropriate for Mr. Park to determine which of my clients' documents are confidential and which can be made freely available to you. While I have the highest regard for Mr. Park's integrity and ability, he obviously is in no position to make any decisions concerning my clients' documents or rights.

Accordingly, I suggested to Mr. Park that you deal with us directly with respect to any documents produced by our clients in 1973. (To the extent your letter attempts to describe conversations between my office and Mr. Park, I make no comment; I expect that there will be no dispute between Mr. Park and me concerning what was said.)

Subsequently, Ms. Sears of your office spoke with my associate, Mr. Finell, and arranged to follow this procedure. Ms. Sears stated that your office had no interest in the particular items we consider confidential—namely, yarn processing conditions employed by our clients, quantities of production, and royalty revenues—and stated that she would be in touch with us to set up an appointment to inspect our clients' documents at our office.

If you will attempt to work with us, we will make available all of the documents our clients have produced which are not confidential we will describe which documents are confidential so that you will be able to determine whether further steps are necessary on your part.

If you can think of any other procedure which is responsible and more reasonable, I would be glad to consider it.

We have no quarrel with you or your clients, and I do not wish to become involved in endless motions, appeals, mandamus applications, and certiorari petitions concerning these documents. Both of us have more significant things to do with our time.

In short, can't we try to work this matter out like reasonable and responsible lawyers?

Very truly yours,

/s/ Jay Greenfield

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LETTER FROM CHARLES B. PARK, III TO EDWARD S. IRONS,

November 6, 1973

Dear Mr. Irons:

This will acknowledge receipt of your letter of October 30, 1973 relating to your clients' "access to certain documents, etc. compiled and prepared in Consolidated Civil Action No. 71-306".

In order that the record may be complete, we think it should be made clear that our offer of access extends to all materials compiled and prepared in the action as of the date of Judge Hemphill's January 22, 1973 Order giving you access to such materials.

As to materials compiled and prepared since the date of Judge Hemphill's Order, Mr. Greenfield, counsel for DMRC, DMI and Chavanoz, is insisting that you deal directly with him with respect to your access to documents produced by, and transcripts of depositions of employees of, his clients.

As to documents produced by, and transcripts of depositions of employees of, Ateliers Roannais de Constructions Textiles since the date of Judge Hemphill's Order, we have advised you that Mr. Granville Brumbaugh, counsel for ARCT, has given us permission to give you access to these materials.

Very truly yours,

/s/ Charles B. Park, III

LETTER FROM EDWARD S. IRONS TO JAY GREENFIELD

November 15, 1973

Dear Mr. Greenfield:

We were pleased to receive your letter of November 2, 1973. We apologize for the delay in response, attributable to our involvement in deposition proceedings.

Certainly we concur in your suggestion that we "try to work this matter out like reasonable and responsible lawyers". Indeed, this is the approach which we have always undertaken in connection with this matter. I believe that it is the approach which you also indicated at the hearing of December 7, 1972 (Tr. 16) before Judge Hemphill.

Our reluctance to deal with you directly with respect to documents produced by your clients in 1973 is accurately stated in the paragraph beginning at the bottom of page 2 and concluded at the top of page 3 of our letter of October 30, 1973 to Mr. Park.

You have stated in your letter "that if we can think of any . . . procedure" other than those which you have suggested and which is "responsible and more reasonable" that you will be glad to give consideration thereto.

Your letter also indicates that you are in the position to "make available all of the documents [your] clients have produced which are not confidential" and to "describe which documents are confidential". You also state that Mr. Park "obviously is in no position to make any decisions concerning [your] clients' documents or rights".

Approaching this matter as a reasonable and responsible lawyer, I suggest that you indicate to Mr. Park in writing those documents which your clients "have produced which are not confidential" and authorize Mr.

Park to release those documents to us promptly. I further understand that you have refused to proceed in such manner at the suggestion of Mr. Park and to the extent that you may have so refused, I ask that you reconsider your position.

I also suggest that you describe in writing to me and to Mr. Park "which documents are confidential" so that we may agree upon an appropriate form of protection for your clients' interests which will permit those documents to be released by Mr. Park to us as counsel for such review as we may deem appropriate. In this regard, we reaffirm our previous undertaking to be bound by whatever protective orders may have been imposed by Judge Hemphill with respect to the specific confidential materials involved.

In addition, we respectfully suggest that all of the problems which we have encountered may be avoided if you are willing to proceed in a reasonable and responsible way consistent with your statements on the record of the aforementioned December 7, 1972 hearing. Specifically, we suggest that you promptly represent in writing to us and to the Court that you will *not* seek, directly or indirectly, the imposition upon Celanese and FII of any penalties in connection with this matter; that you will accept the reasonable cost of copying of the documents which we specify as a total discharge of our obligations insofar as you and your clients are concerned; and that you request the Court to concur in that arrangement insofar as your clients are concerned.

We appreciate the attitude reflected by your letter of November 2nd. We trust that you will be able to agree with the aforementioned approach.

Sincerely,

/s/ Edward S. Irons

LETTER FROM EDWARD S. IRONS TO DAVID RABIN,

November 15, 1973

Dear Mr. Rabin:

Mr. Joseph Hamilton testified in the South Carolina litigation, C.A. 71-306, on March 26 and 27, 1973.

Mr. Park has advised Mr. Spellman that he will not release Mr. Hamilton's aforesaid deposition to Mr. Spellman absent your approval.

We wish to obtain promptly a copy of this deposition in its entirety together with copies of all the exhibits as actually marked during the course of the deposition or which are referred to in the deposition.

Will you please advise by your reply to this letter, with a copy to Mr. Park, whether or not Mr. Park has your permission to supply this material promptly to us.

Very truly yours,

/s/ Edward S. Irons

LETTER FROM CHARLES B. PARK, III TO EDWARD S. IRONS,

November 20, 1973

Dear Ed:

We have a copy of your letter of November 15, 1973 to Dave Rabin concerning your access to the deposition transcript of Mr. Joseph Hamilton taken in the above proceeding on March 26 and 27, 1973.

When I told you some time ago that we would be willing to furnish you access to our depository of discovery materials obtained by the Throwsters in the South Carolina litigation (except the post-January 1, 1973 materials about which you have been corresponding with Mr. Greenfield), there was no discussion with respect to discovery *by* DMRC et al of the Throwsters.

I have told Marty Spellman on several occasions during the past few weeks while he was here at our office inspecting documents, etc., that we did not maintain a depository of DMRC's discovery materials obtained from the Throwsters. Accordingly, we are not in a position to furnish you access to DMRC's Texfi discovery materials, or any other DMRC Throwster discovery materials, other than Duplan's, to which you have already been given access.

I hope this clarifies this matter for you.

Very truly yours,

/s/ Charles B. Park, III

AFFIDAVIT OF MARTIN J. SPELLMAN, JR., executed October 30, 1973, filed in the District Court for the Southern District of Florida on or about November 2, 1973

MARTIN J. SPELLMAN, JR. being duly sworn deposes and states that:

1. He is a partner in the firm of Irons, Sears & Santorelli, counsel for Celanese Corporation (CELENESE) and Fibers Industries, Inc. (FII):

2. Since the morning of October 22, 1973, he has been reviewing, daily, the transcripts of depositions and copies of production documents in the action of The Duplan Corporation v Deering Milliken, Inc., et al C.A. 71-306 United States District Court, District of South Carolina, Rock Hill Division, at the offices of Parrott, Bell, Seltzer, Park & Gibson, Charlotte, North Carolina.

3. Of said transcripts and production documents examined by him to date, in excess of about thirty per cent bear directly or indirectly on matters of this present litigation and must be thoroughly considered to properly represent the interests of CELANESE and FII.

4. He estimates that to complete the review of said transcripts and production documents will require at least two and one-half to three man months.

Further deponent saith.

/s/ Martin J. Spellman, Jr.